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No. 81-331

IN THE

Supreme Court of the United States

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA
and
THE UNITED CONTRACTORS ASSOCIATION,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
and RAYMOND WILLIAMS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEFS OF INDIVIDUAL AND CLASS AND COMMONWEALTH RESPONDENTS

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* All references to the Appendix to Petitions for Certiorari will be designated by "PA. ____"; all references to the Joint Appendix on Writ of Certiorari will be designated by "JA. ____". The brief for Individual and Class Respondents is cited as "Resp. Ind. Br.". References to trial transcript will be designated by "____ day, ____". References to Union trial exhibits will be designated by "U- ____".

ARGUMENT

I. Introduction.

Petitioners Contractors Association of Eastern Pennsylvania and the United Contractors Association note that Respondents' briefs to this Court are filled with inaccuracies and mischaracterizations of the record and of the opinion of the district court. So, also, the Petitioners have found that Respondents' legal arguments regarding the associations contain sweeping generalities wherein bald conclusions are arrived at without the benefit of any meaningful legal reasoning. Likewise, these Petitioners find that Respondents' citation to authority relied upon to support their propositions are often misleading.

Because of the Respondents' over-reaching, these Petitioners find it imperative to emphasize at the outset that the district court *did not find* that they had engaged in any intentional discrimination against minorities. Accordingly, the district court did not hold that they violated § 1981, nor that they denied to minorities the same right to make and enforce contracts as was enjoyed by whites. Rather, the district court held that each of these non-employer associations was liable vicariously, at least injunctively, for the Union's intentional discrimination in breach of § 1981 (PA. 168). The question of whether legal responsibility for the Union's discrimination can be lodged beyond the Union itself is what this Court must determine.

In addition, contrary to the Respondents' assertions, these Petitioners emphasize that the district court did not premise any association liability on any conduct of the Operating Engineers Joint Apprenticeship and Training Committee ("JATC"). It is imperative to note that the district court did not hold that anyone other than the JATC itself was liable for its discrimination. The district

court did not hold that the JATC trustees were the agents of any principal, and it is worthy of note that such a finding would have been improper under this Court's decision in *NLRB v. Amax Coal Co.*, 101 S. Ct. 2789 (1981), which decision makes clear that the trustee's duty is to the beneficiaries of the trust to the exclusion of the interests of all others. It was stated therein that "the duty of the management-appointed trustee of an employee benefit fund . . . is directly antithetical to that of an agent of the appointing party." *Id.* at 2795.

II. Respondents' Discussion of the Evolution of the Affirmative Action Program Is Irrelevant and Misleading.

In their briefs, both the Commonwealth and the Individual and Class Respondents discuss the Affirmative Action Program ("AAP") and its relation to the Union's federally-granted exemption from the Philadelphia Plan. The discussion of this matter in Respondents' briefs progresses as if this information is somehow relevant to the matter at bar. It clearly is not. However, for purposes of clarification, we will engage in a brief discussion of this matter.

Notwithstanding Respondents' assertions to the contrary, the district court did not find that any association or employer violated the law by any association's signing of the so-called AAP (PA. 198). Quite to the contrary, the district court grounded the Petitioners' vicarious liability under § 1981 for the acts of the Union solely "as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated racial discrimination, whether or not the . . . *associations* knew or should have known" (PA. 168). Moreover, it is noted that the AAP was an alternative to the so-called Philadelphia Plan only insofar as the Plan's reporting requirements

related to work to be performed by the operating engineers' craft.[1]

The initial Philadelphia Plan came into existence on November 30, 1967, when the United States Department of Labor approved the Philadelphia Pre-Award Plan as a vehicle for providing affirmative action in employment among certain government contractors. As initially devised, the Plan itself was extremely limited in application for it applied only to federally-funded construction projects which were to exceed $500,000 and which were to be located in the immediate five-county Philadelphia area (JA. 173).[2]

The initial Philadelphia Plan required the apparent low bidder on the covered federally-funded job to include in its job contract an affirmative action program with specific manning tables containing a specific quota or schedule for minority employment for certain construction trades, including the operating engineers (JA. 173). The first construction project affected by this newly devised Philadelphia Plan was the construction of the Girard Point Bridge in Philadelphia County. A non-Pennsylvania contractor, Peter Kiewit and Sons Company of Omaha, Nebraska, was the low bidder on this thirty million dollar project (U-312). At the April, 1968, pre-job conference, the U. S. Department of Transportation, pursuant to the Philadelphia Plan requirement, requested a specific minority manning table for the job. At this time, Kiewit informed the federal government that it could not guarantee

1. Despite the signing of the Affirmative Action Program document, no contractor was relieved from following the Philadelphia Plan's specific minority manpower utilization requirements for the other Philadelphia-based craft construction trades covered by the Plan.

2. In contrast, Local 542's geographical jurisdiction covered all thirty-three counties of Eastern Pennsylvania and the entire State of Delaware.

specific quotas for operating engineers because it could not hire operating engineers directly (U-312, U-311, 132nd day 12067). In support of Kiewit's position, Pennsylvania's Secretary of Highways objected to the manning table demand because the Commonwealth believed that the manning table requirement was violative of the Civil Rights Act of 1964 (U-312).[3] Nonetheless, the federal government overruled the Commonwealth's objections and continued to withhold awarding this $30 million construction project to Kiewit.[4]

Shortly after the federal government's dispute with Kiewit and the Commonwealth surfaced, representatives of the U. S. Department of Labor summoned representatives of the Petitioner Associations to a meeting in Washington, D. C. (132nd day, 11945). As evidenced by the Kiewit situation, the U. S. Department of Labor realized that Local 542's hiring hall created a unique situation. Therefore, at this meeting the representatives of the U. S. Department of Labor presented the Associations' representatives with an already-drafted Affirmative Action Program document. As was explained to them by the federal government officials and the Local 542 representatives who also were in attendance at this meeting, the meeting was called to discuss an Affirmative Action Program, the content of which had been previously sanctioned by the U. S.

3. This original Philadelphia Pre-Award Plan was suspended and rescinded because of an Opinion by the U. S. Controller General that it violated the principles of competitive bidding (J.A. 173; 291-292).

4. At the time in question Kiewit was *not* a member of any Petitioner Associations. Moreover, it is equally important to note that the record evidence reveals that no contractor-member of the Petitioner Associations ever had any monies withheld from it as a result of the Philadelphia Plan's requirement for minority manning tables (132nd day, 11955-56).

Department of Labor for an operating engineers' local in Ohio which also had an exclusive referral system (132nd day, 11946-57, 12006-07; 12063-66).

This already-drafted document, in paragraph three thereof, stated that as a result of a detailed analysis, it was determined that there were 650 minorities affiliated with Local 542. In reviewing the document during their meeting, the Association representatives questioned Labor Department official Gentry and Local 542 President Dawson about the numerical count in paragraph three. In response, Mr. Gentry informed the Associations' representatives that he believed that the 650 number was a logical estimate (132nd day, 12063-64). Mr. Dawson likewise advised the Associations' representatives that he believed the figure was the correct estimate based upon the information that was available to Local 542 at that time (132nd day, 12064-65). In fact, in the previous year, the Union in its 1967 EEO-3 Report to the EEOC, estimated a total of 650 minorities out of 5000 members (P-169). Since the Petitioner Associations themselves had no way of knowing the number of minorities who were associated with Local 542, they accordingly relied upon the federal official and the Union for the minority number count.[5]

In this regard, it is most important to note that although the district court chastised the Associations for signing the Affirmative Action Program without first verifying the minority count, it found that the *Associations neither had actual knowledge of the formal error in figures or of the Union's discrimination generally* (PA. 198). In fact, the record evidence reveals that within a few months

5. Since the Petitioner Associations herein only bargained for approximately 100 of the 1488 contractors under agreement with Local 542, even an accurate survey of their own membership would have proved unhelpful.

after the signing of the Affirmative Action Program, Local 542 advised the U. S. Department of Labor that the approximation of 650 was incorrect.[6] However, despite this correction in the number, the U. S. Department of Labor specifically opted not to reinstate Local 542 within the coverage of the Philadelphia Plan when the Department amended its Philadelphia Plan on June 7, 1969, or at any time thereafter.

III. Petitioners CAEP and UCA Cannot Be Liable for the Union's Violation of § 1981.

A. Respondents' Non-Delegable Duty Argument Is Without Merit.

The factual underpinning for the Respondents' assertions that the employers and associations are liable for the Union's discriminatory conduct in operating the hiring hall was the finding that the *employers* delegated a function of their hiring process to the Union (PA. 169-70). However, this finding is totally immaterial to and unsupportive of a conclusion of liability as against the associa-

6. In Local 542's February 22, 1969, Affirmative Action Program written status report presented directly to Mr. Stalvey of the U. S. Department of Labor, the Union enclosed its February 17, 1969, letter to the EEOC. In that letter the Union advised the EEOC that the racial identification information on the enclosed EEO-3 form was based on a questionnaire survey mailed out to the Union's 6000 members to which 2845 responded. Of these, 193 identified themselves as minorities. In that letter, the Union stated "[I]t is our impression that the total of 193 minorities is less than the actual number of minorities in the union, but do not feel qualified to change the figure for the returns received, although less than half of the questionnaires were returned. If we were to take a guess, since we have received about one-half of the questionnaires, we could double the minority number reported. However, we feel that we should not do so under the circumstances" (U-313, Exhibit 5, pp. 1-2).

tions. Clearly, as non-employers of operating engineers,[7] the associations *never delegated* any part of their hiring process to the Union. Therefore, in the actual operation of the referral system, the Union personnel never performed any function that the trade associations would themselves ever have had to perform irrespective of whether the collective bargaining agreement contained a hiring-hall provision.

In light of the foregoing, there can be no basis for the conclusion that there exists as between the associations and the Union even a principal-independent contractor relationship, let alone a master-servant relationship. Moreover, since it is clear that no principal-independent contractor relationship exists between the associations and the Union, it is equally clear that the concept of non-delegable duty cannot be utilized as a basis for imposing liability against the CAEP and UCA.

1. Section 1981 Does Not Give Rise to a Non-Delegable Duty.

The main thrust of Respondents' arguments is that § 1981 imposes a non-delegable duty upon the Petitioner Associations such that the Union's discrimination in referral is attributable to the CAEP and UCA even if the CAEP and UCA had no knowledge or reason to know of any discrimination being practiced by the Union.[8] Section 1981 does not permit such an interpretation.

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7. Respondents urge this Court totally to ignore the record in this case when they make the argument that associations are sometimes considered to be employers under the discrimination laws. Unfortunately for Respondents, the facts are only too clear—the associations never have employed any operating engineers. The sole function of these associations was to act as multi-employer collective bargaining representatives for some of the contractors.

8. The court below invoked *respondeat superior*, a concept based upon the relationship of master and servant, to justify its

In seeking to determine legislative intent when undertaking the task of interpreting a statute, the three factors traditionally relied upon by the judiciary are "the language and focus of the statute, its legislative history, and its purpose." *Touche Ross & Co. v. Redington*, 442 U. S. 560, 575-76 (1979), *citing Cort v. Ash*, 422 U. S. 66, 78 (1975). Nothing in the language or legislative history of § 1981 gives rise to a non-delegable duty, and when such a duty arises from a statute, that duty must be clearly expressed in the statute. Apparently, this is not enough to dissuade Respondents, who conclude without evidence of any cogent legal reasoning that § 1981 does indeed give rise to such a duty.[9]

In *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U. S. 77, 97 (1981), this Court cautioned against adding new remedies in the absence of a determi-

8. (Cont'd)

imputing vicarious liability to the trade associations. Respondents do not seriously attempt to bolster the district court's finding of liability on the basis of *respondeat superior*. Indeed, they cannot do so since, as demonstrated in these Associations' principal brief, associations do not exercise the quantum of control over the actions of Local 542 necessary to create a master-servant relationship. Instead, plaintiffs focus their attention on the asserted existence of a non-delegable duty on the part of the associations, apparently conceding thereby that Local 542 must be viewed at most as an independent contractor.

9. The language of § 1981 is not directly addressed to anyone, nor does it expressly create any duties. It speaks simply of the right of all persons to make and enforce contracts on the same basis as whites. By reference to the express terms of § 1981 then, liability may only be imposed for the denial to black persons of the right to contract on the same basis as whites. In this case there has been no finding that the associations denied to blacks this right. Only the Union was found to have denied blacks the right secured by § 1981.

nation that these remedies were contemplated by the Congress. In that case, as here, the question of liability "is entirely a creature of federal statute." [10] While the Court noted that most statutory schemes require some judicial interpretation, it stated that "the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." [11] Since there can be no other basis whatever for holding these Petitioner Associations liable, Respondents urge this Court to read some all-encompassing non-delegable duty into § 1981. In the absence of any indication of Congressional intent in this regard, this Court must heed its admonishment in *Northwest Airlines* and not fashion such a new rule of liability for § 1981.

Even if this Court were inclined to find the equitable considerations advanced by Respondents to be compelling, this Court still cannot attach liability against the Associations by finding a non-delegable duty under § 1981. As was noted in *Northwest Airlines, supra* at 98, n. 41, those equitable considerations should be addressed to Congress rather than to the federal courts. In *United States v. Gilman*, 347 U. S. 507 (1954), a case such as this involving the interpretation of a federal statute, this Court instructed:

> [T]he claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriate

10. 451 U. S. at 97.

11. *Id.*

for those who write the laws, rather than for those who interpret them.[12]

Finally, this Court has been hesitant to impose liability based on the doctrine of non-delegable duty. *See Logue v. United States*, 412 U. S. 521, 529 n. 7 (1973). In that case, the "duties" required under 18 U. S. C. § 4042 were specifically enumerated in direct contrast to the generalized right set forth in § 1981. Yet, even there a non-delegable duty was not found to have arisen.

2. The Cases Relied Upon by the Respondents Do Not Support a Finding of Liability Against the CAEP or UCA Under the Principle of Non-Delegable Duty.

The Respondents, by reference to a 1918 New York case and a number of civil rights cases, seek to demonstrate that the principle of non-delegable duty operates in this case to hold the associations liable even though the associations *do not themselves employ operating engineers.*[13] However, none of the cases upon which Respondents rely even remotely supports their proposition that a non-employer association can be liable for intentional discrimination practiced by a union in its referral of operators to work in the absence of the association's knowledge or reason to know of the discrimination.

In *People ex rel. Price v. Sheffield Farms-Slawson Decker Co.*, 225 N. Y. 25, 121 N. E. 474 (1918), the em-

12. 347 U. S. at 511-13.

13. As stated in the Association's initial brief, under § 1981 the CAEP and UCA have the duty not to discriminate intentionally. As the record reflects, the Associations have never attempted to shed that duty. In fact, in their limited role of employer negotiating agents, the CAEP and UCA agreed in collective bargaining to a referral-system provision which is clearly non-discriminatory on its face.

ployer was found to have violated the New York law against employing children, which law expressly imposed duties upon employers. One of the employer's drivers had seen fit to employ a child contrary to a rule the employer had promulgated, as well as the law. The court held the employer directly responsible since the violation of the law was committed by an employee (a servant). Surely, that case can have no bearing where, as here, the violation was committed by the Union, not a servant of the associations, which are not employers of operating engineers.

Respondents also seek to rely upon "Title VII and § 1981 [cases] hold[ing] employers responsible for their hiring agents' intentional discrimination" (Resp. Ind. Br. 26) for the proposition that the duty imposed by § 1981 is non-delegable. In every one of the cases cited by the Respondents the 'hiring agent' was an employee supervisor of the employer. The discrimination of the supervisor was chargeable to the employer under the principle of *respondeat superior*; non-delegable duty is not a basis of liability in any of the cases. As for the associations, the attempted imposition of liability based on these cases is so attenuated as to be ludicrous.

The cases involving the fair housing laws which Respondents cite are also wholly unsupportive of the presence of a non-delegable duty in § 1981.[14] Although some

14. There is simply no reason to assume that because of Title VIII's proscriptions against discrimination in the sale of real estate, Section 1981 creates a non-delegable duty in the area of employment. Unlike Title VIII's ban on discrimination, Section 1981's declaration against non-discrimination cannot be viewed in a vacuum. Rather, it must be read in harmony with the pervasive regulatory scheme created by the National Labor Relations Act. *See Emporium Capwell Co. v. Western Additional Community Organization*, 420 U. S. 50 (1975). When viewed in the context of the National Labor Relations Act, the employers' entering into a perfectly legal exclusive hiring hall system in the instant case

of these cases allude to the non-delegable duty principle, all of the cases involve liability of masters or principals for the intentional acts of discrimination perpetrated by their employee-servants. In not one of the cases in which non-delegable duty is mentioned is there any analysis of the concept. Rather, its existence is merely assumed in passing and, in fact, is *dicta* since the cases impute liability vicariously.

Lastly, the Fourteenth Amendment state action cases cited by Respondents are wholly inapposite. None of the cases even mentions the non-delegable duty principle, but rather are directed to the specific issue as to when the involvement of the state is sufficient for a violation of the equal protection clause contained in Section 1 of the Fourteenth Amendment to be made out. These cases have nothing whatever to do with the question of the interpretation of a federal statute—§ 1981—in order to determine whether it contains a non-delegable duty.

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14. (Cont'd.)

cannot possibly subject their non-employer negotiating representative to liability on the theory of breach of a non-delegable duty.

In *Teamsters Local 357 v. NLRB*, 365 U. S. 667 (1961), the Supreme Court specifically rejected the NLRB's contention that hiring halls were inherently discriminatory, and approved of their use. The Court noted that hiring halls in the construction industry have long been recognized as the most economic and efficient manner of allocating jobs in a transitory work situation. 365 U. S. at 672. In fact, a union's demand for an exclusive hiring hall provision is a mandatory subject of bargaining under the NLRA. *NLRB v. Houston Chapter, Associated General Contractors of America, Inc.*, 349 F. 2d 449 (5th Cir. 1965). In view of these expressions of our national labor policy, it borders on the ridiculous to suggest that an employers' bargaining representative who enters into a bona fide hiring-hall arrangement can be held vicariously liable for the Union's acts of discrimination on the theory that Section 1981, which by its language imposes no duty on any specific individual, creates a non-delegable duty.

B. The Hiring-Hall Was Not a Joint Enterprise.

The Individual and Class Respondents engage in a re-drafting of the district court's opinion when they state that the district court, in the alternative, held that the hiring-hall was a joint enterprise of the Union and the contractors and the associations. To the contrary, the district court did not make any alternative holding, and never even used the term "joint enterprise." [15]

Notwithstanding the Respondents' mischaracterization of the opinion of the district court, the law that has developed in the area of "joint enterprise" clearly compels the conclusion that just as the hiring-hall cannot be said to be the agent of the CAEP and UCA, similarly, the CAEP and UCA and the Union cannot be said to have embarked upon a joint enterprise through the employers' coerced agreement to the hiring-hall system. The four elements which must all be present for a joint enterprise to exist may be found in the Restatement (Second) of Torts § 491:

> (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecu-

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15. Respondents rely upon the case of *Stockwell* v. *United States*, 80 U. S. 531 (1879), to support their contention that the hiring-hall was a joint enterprise of the employers and the Union and which somehow included the CAEP and UCA. In fact, the business arrangement in *Stockwell* was a partnership, not a joint enterprise. As the Court stated: "By the arrangement he [Stockwell] became a partner with them in the shingle business." *Id.* at 544. Thus, Stockwell's tortious acts were attributable to his partners. Respondents have not and cannot seriously contend that the associations and the Union were partners, and therefore *Stockwell* is wholly unsupportive of their claim of the existence of a joint enterprise.

> niary interest in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Certainly, the requirement that there be a community of pecuniary interest between these trade Associations and the Union cannot be satisfied. The relationship between an employer's bargaining agent and union which is delineated in the National Labor Relations Act, specifically 29 U. S. C. § 158(a)(2), does not ever permit the existence of such a community of pecuniary interest. Moreover, the CAEP and UCA have no ownership interest whatever in Local 542, its hiring hall, or any of the contractor-employers who utilize it.

In addition, the CAEP and UCA have no equal right to control the actual operation of the Union's hiring-hall. In fact, the hiring hall is simply a segment of the Union.[16] It has no meaningful existence separate and apart from the Union. Indeed, the collective bargaining agreement requires employers to request referrals exclusively from the Union. In fact, there is absolutely *no* mention of a hiring hall in the collective bargaining agreement (JA. 240-47). Moreover, the record evidence is indisputably clear that the referral dispatcher, and indeed all persons with any responsibility whatever for the operation of the hiring-hall referral-system, are employees of the Union. The associations have nothing at all to do with the actual operation of the system. In fact, as non-employers of operating engineers, the associations have no need whatever to make use of the Union's hiring hall.

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16. As even the district court acknowledged: "The plaintiffs' seek to hold the class of defendant contractors liable for the acts of the *union* in *its* hiring hall operation" (emphasis added) (PA. 169).

C. There Exists No Relationship Supportive of Vicarious Liability.

In addition to the reasons set forth previously, the Union cannot be held to be the hiring agent of the CAEP and UCA, who themselves hire no operating engineers. As is clear from the record, these trade Associations simply do not possess the right to control the day-to-day operations of the Union's referral of workers to any or all of the 1488 contractors who were required to obtain their workers through the Local 542 dispatch system. As emphasized by this Court in *Logue, supra,* in evaluating whether an agency relationship exists the "*critical factor* . . . is the authority of the principal to control the detailed physical performance of the contractor" 412 U. S. at 528-29 (emphasis added). The petitioner in *Logue* contended that the statute involved, 18 U. S. C. § 4042, imposed "a duty on the Bureau of Prisons to provide for the safekeeping, care and subsistence of all persons . . ." *Id.* at 529. This Court noted that the county provided custody in accordance with rules and regulations of the Bureau of Prisons which specified treatment standards, discipline methods and rules on such matters as employment, visitation privileges, and attorney communications. Because of the matrix of federal rules and regulations, it was petitioner's contention that the employees of the county jail were employees of the federal government rather than employees of an independent contractor. This Court held that even though the federal government retained the right to inspect the facilities, it had no authority to "physically supervise the conduct of the jail's employees." *Id.* at 531. Similarly, although there are rules governing the operation of the hiring-hall system in this case, the associations did not have either the authority or the ability to "physically supervise the conduct of the Union's employeess" in their operation of the system.

As has been repeatedly emphasized in all of Petitioners' briefs, in order for the associations or the contractors to be vicariously liable for the discriminatory acts of the Union, there must be some evidence of a master-servant relationship as between them and the Union. The key element to such a relationship is the right to control the servant in his physical manner of performance on a day-to-day basis. The application of this well-established principle to the facts in the instant case supports but one conclusion—the Union, in discriminatorily breaching the referral-system rules, was *not* acting as a servant on behalf of either the CAEP or UCA, but at most was an independent contractor.

Moreover, the district court attempted an analysis of this right to control element *only* in *footnote 61* of its opinion (PA. 192-93). It is instructive to note that the *associations were never mentioned* in footnote 61. The element of control is examined *only* as to the *employers*. Not even the district court could find a sufficient nexus as between the associations and the Union to simply provide a basis for a discussion of the element of right to control. Absent the right to control, absent any knowledge or reason to know, and failing ever to employ any operating engineer, there simply cannot be any basis whatever for this Court to hold the CAEP or UCA liable.

IV. The Injunctive Decree Against the Associations and Employers Is Not Authorized by the All Writs Act.

Respondents argue that the All Writs Act, 28 U. S. C. § 1651, authorized the district court to include the associations and employers in its injunctive decree.[17] The district court did not rely on nor did it mention the All Writs Act as a basis of support for its injunctive decree.

17. Petitioners CAEP and UCA incorporate herein by reference the discussion of the All Writs Act, 28 U. S. C. § 1651, contained in the Reply Brief of Bechtel Power Corporation.

The court of appeals, while it requested briefing, did not find that the All Writs Act authorized the decree.

Despite the use of the All Writs Act as a basis for compelling the assistance of the telephone company in the carrying out of a search warrant, *United States v. New York Telephone Co.*, 434 U. S. 159 (1977), the All Writs Act is not a wide-ranging license for federal courts to issue orders or writs against third parties who themselves have not engaged in wrongdoing. No case holds that the statute furnishes a district court with a substitute vehicle for imposing a remedial injunction on a party after it has found that party not to have faulted on some duty or legal obligation. By the very language of Section 1651(a), a writ or order issued under the section must be in aid of the court's jurisdiction *and* conforming to usages and principles of law. Since neither of these two prongs, as they have been developed in the third-party context, is met in the instant case, the All Writs Act is not appropriate authority for enjoining the associations and employers to perform such substantial actions.

In *New York Telephone, supra*, this Court made plain that the jurisdictional component of Section 1651(a) was met because the order against the third-party telephone company was required to prevent the court's issuance of a warrant from being a useless act. In the instant case, by contrast, there can be no question but that the district court had jurisdiction over the Union and that the order issued against the associations and employers is in no way required for the injunction against the Union to be fully operative.

Reference to this Court's careful detailing of the factors which rendered the order against the telephone company non-burdensome in *New York Telephone* demonstrates that that case provides no basis for a far-reaching remedial injunction against the associations and employers.

That injunction is clearly a burdensome intrusion upon the business operations of private associations and employers. *See Plum Creek Lumber Co. v. Hutton*, 608 F. 2d 1283 (9th Cir. 1979). Under the terms of the judgment and decree, the associations are compelled to participate in a detailed record-keeping, reporting, and compliance system under the direction and control of a court-appointed master. These injunction features have required and will require the expenditure of substantial sums of money by the associations and the employers to effect compliance. The All Writs Act plainly does not serve as a substitute for a liability finding as the basis for such an onerous order.

CONCLUSION

In view of the foregoing, the judgment of the court of appeals as to the CAEP and UCA should be reversed and this Court should remand for entry of judgment in favor of the CAEP and UCA and for modification of the injunction so as to exclude them from its terms.

Respectfully submitted,

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